No. 06-1721

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SUPREME COURT, U.S.

In the Supreme Court of the United States

MARAKAY J. ROGERS, et al.,
Petitioners,

v.

PEDRO A. CORTES, Secretary of Pennsylvania,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE DEMOCRACY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

Preliminary Statement 2

Argument 2

I. Section 2911(b) severely burdens minor party candidates by subjecting them to costs that grossly exceed fees this Court has struck down as unconstitutional 2

II. Section 2911(b) severely burdens minor party voters by forcing them to cast write-in votes that the State fails to count 5

III. Section 2911(b) severely burdens minor political parties by terminating their legal status as political parties 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

Amos v. Hadnott, 394 U.S. 358 (1969) 9

Anderson v. Celebrezze, 460 U.S. 780 (1983) 9

Bullock v. Carter, 405 U.S. 134 (1972) 3, 4

Burdick v. Takushi, 504 U.S. 428 (1992) 7

Bush v. Gore, 531 U.S. 98 (2000) 5

Communist Party of Indiana v. Whitcomb,
414 U.S. 441 (1974) 9

De Jonge v. State of Oregon, 299 U.S. 353 (1937) 5

Gray v. Sanders, 372 U.S. 368 (1964) 5

Illinois State Bd. of Elections v. Socialist Workers Party,
440 U.S. 173 (1979) 9

In re Nader, 905 A.2d 450 (Pa. 2006), *cert denied*,
549 U.S. __ (2007) 3

In re Nomination Paper of Marakay Rogers,
914 A.2d 457 (Pa. Comm. 2007) 3, 4

Jenness v. Fortson, 403 U.S. 431 (1971) 7

Lendall v. Jernigan I, not reported, (1976),
aff'd, 433 U.S. 901 (1977) 9

Lubin v. Panish, 415 U.S. 709 (1974) 4

McCarthy v Briscoe, 429 U.S. 1317 (1976) 9

Moore v. Ogilvie, 394 U.S. 814 (1969) 9-10

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 5

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 4

Norman v. Reed, 502 U.S. 279 (1992) 9

Rogers v. Cortes, 426 F. Supp. 2d 232 (M.D. Pa. 2006),
aff'd 468 F.3d 188 (3rd Cir. 2006) 2, 4, 8

Salera v. Tucker, 399 F. Supp. 1258 (E.D. PA 1975),
aff'd, 424 U.S. 959 (1976) 9

Socialist Workers Party v. Rockefeller,
314 F. Supp. 984 (S.D. NY 1970),
aff'd, 400 U.S. 806 9

South v. Peters, 339 U.S. 276 (1950) 5

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 5

United States v. Mosley, 238 U.S. 383 (1915) 5

Williams v. Rhodes, 393 U.S. 23 (1968) 7, 10

Statutes

25 Pa. Const. Stat. § 2831(a) 8
25 Pa. Const. Stat. § 2911(b) 2, 3, 8
25 Pa. Const. Stat. § 2963(a) 5

Other

"Commonwealth of Pennsylvania 2006 Voter Registration Totals," available at http://www.dos.state.pa.us/elections/lib/elections/055_voter_registration_statistics/2006genelectionvoterregistotalscounty_unofficial.pdf 9

"Pennsylvania Write-in Votes by County, November 2006 General Election," on file with Center for Competitive Democracy (data provided by Pennsylvania Secretary of State's Bureau of Commissions, Elections and Legislation) 6

"Voter Registration Statistics," Pennsylvania Department of State, available at http://www.dos.state.pa.us/elections/cwp/view.asp?a=1310&q=447072 6

I

INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Democracy is a non-partisan, non-profit 501(c)(3) organization founded in 2005 to strengthen American democracy by increasing electoral competition. The Center works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process.

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[1] This brief is filed with consent of the parties. Letters of consent are on file with the Center for Competitive Democracy. The Coalition for Free and Open Elections paid for printing costs. No counsel for any party to this case authored the brief in whole or in part.

PRELIMINARY STATEMENT

The Center for Competitive Democracy respectfully submits this brief in support of Petitioners to notify the Court of three important factors not evident from the record below, which indicate an urgent need for the Court to accept the Petition for certiorari filed in *Rogers v. Cortes*. First, the challenged statute, Section 2911(b) of the Pennsylvania election code, imposes severe financial burdens on minor party candidates, which grossly exceed those this Court has struck down as unconstitutional. Second, Section 2911(b) disenfranchises thousands of minor party voters who cast valid write-in votes that the State fails to count. Third, Section 2911(b), in operation with other provisions of Pennsylvania's election code, has terminated the legal status of the Libertarian Party, the Green Party and the Constitution Party as minor political parties in the state of Pennsylvania. The Center for Competitive Democracy therefore requests the Court to grant the Petition for certiorari so that the Court may redress the severe burdens that Section 2911(b) imposes on minor party candidates and voters, and on minor parties themselves.

ARGUMENT

I. Section 2911(b) severely burdens minor party candidates by subjecting them to costs that grossly exceed fees this Court has struck down as unconstitutional.

The District Court found that Section 2911(b) of the Pennsylvania election code "does not impose a severe burden" on minor party candidates. *Rogers v. Cortes*, 426 F. Supp. 2d 232, 239 (M.D. Pa. 2006), *aff'd* 468 F.3d 188, 197 (3rd Cir. 2006); *see* 25 Pa. Const. Stat. § 2911(b) (requiring minor

party candidates to collect signatures equal to two percent of the largest vote cast for a candidate in the last statewide election). This was clear error. In fact, Section 2911(b) imposes the most severe financial burdens on minor party candidates ever recorded in American history.

The Pennsylvania Supreme Court recently construed the State's election code to authorize taxation of costs against candidates who defend their nomination papers when private parties sue to challenge them under Section 2911(b). *See In re Nader*, 905 A.2d 450 (Pa. 2006) (ordering candidates to pay $81,102.19 in legal costs to private parties who challenged their nomination papers), *cert denied*, 549 U.S. __ (2007). This decision was without precedent in any jurisdiction in the United States. Nevertheless, a Pennsylvania court relied on this dubious decision to require a candidate in the 2006 elections to pay similar costs. *See In re Nomination Paper of Marakay Rogers*, 914 A.2d 457 (Pa. Comm. 2007) (ordering candidate to pay $80,407.56 in legal costs to private parties who challenged his nomination papers). These candidates were never accused – much less found guilty – of wrongdoing. They merely submitted nomination papers in an effort to comply with Section 2911(b), and mounted a defense when private parties sued to challenge them.

The legal costs Pennsylvania imposes on candidates pursuant to such proceedings clearly violate this Court's precedent holding that states may not require "candidates to shoulder the costs of conducting...elections." *Bullock v. Carter*, 405 U.S. 134, 149 (1972). Pennsylvania does just that, however, by requiring candidates to pay for challenges to their nomination papers brought under Section 2911(b). In effect, Pennsylvania imposes "unfiling" fees on these candidates after removing them from the ballot. Such fees

grossly exceed the filing fees this Court has struck down as unconstitutional. *See Lubin v. Panish*, 415 U.S. 709 (1974) (striking down filing fees ranging up to $982); *Bullock*, 405 U.S. 134 (striking down filing fees ranging up to $8,900). Furthermore, no legitimate state interest justifies Pennsylvania's unfiling fees (such as helping to offset the cost of holding elections), because the fees are payable to private parties rather than to the State.

The courts below thus erred by considering only the burden on candidates who comply with Section 2911(b), and not the burden on those who allegedly fail to comply. *See Cortes*, 426 F. Supp. 2d at 238 ("the fact that candidates from minor parties must potentially expend large sums to solicit signatures is insufficient to render the law unconstitutional"). Indeed, the financial burden on candidates who allegedly fail to comply with Section 2911(b) is so severe that Petitioners Marakay Rogers, Ken Krawchuk and Hagan Smith were compelled to withdraw their nomination papers rather than assume the risk of personal financial destruction. Notably, the only minor party candidate for statewide office who did not withdraw his nomination papers in 2006 is currently appealing an order to pay $80,407.56 to private parties who sued him under Section 2911(b). *See In re Nomination Paper of Marakay Rogers*, 914 A.2d 457 (Pa. Comm. 2007) (unreported order approving bill of costs entered January 24, 2007). Contrary to the lower courts' conclusion, therefore, Section 2911(b) is in fact a functional bar to ballot position for these candidates. *See Cortes*, 426 F. Supp. 2d at 241.

As such, intervention by this Court is necessary to protect the rights of minor party candidates to engage in quintessentially protected conduct by submitting nomination papers for public office. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963) (states may not penalize those who "seek

through lawful means to achieve legitimate political ends"); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958) (states may not penalize those who "engage in association for the advancement of beliefs and ideas"); *Sweezy v. New Hampshire*, 354 U.S. 234, 254 (1957) (states may not infringe the "constitutional rights of individuals...where no state interest underlies the state action"); *De Jonge v. State of Oregon*, 299 U.S. 353, 364-65 (1937) (states may not curtail constitutional rights unless the rights are abused to incite violence and crime).

II. Section 2911(b) severely burdens minor party voters by forcing them to cast write-in votes that the State fails to count.

Minor party voters in Pennsylvania, whose candidates Section 2911(b) functionally barred from the 2006 general election ballot, had no recourse but to cast write-in votes. Pennsylvania's election code guarantees them that right. *See* 25 Pa. Const. Stat. § 2963(a) ("To vote for a person whose name is not on the ballot, write, print or paste his name in the blank space provided for that purpose"). Although the election code does not specify that write-in votes must be counted, the decisions of this Court do. *See Bush v. Gore*, 531 U.S. 98 (2000) ("Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another"); *Gray v. Sanders*, 372 U.S. 368, 380 (1964) ("all qualified voters have a constitutionally protected right to cast their ballots and have them counted"); *South v. Peters*, 339 U.S. 276, 279 (1950) ("The right to vote includes the right to have the ballot counted"); *United States v. Mosley*, 238 U.S. 383, 387 (1915) ("the right to have one's vote counted" has the same dignity as "the right to put a ballot in a box").

In violation of the state election code's explicit provision and this Court's settled precedent protecting the right to vote, nine Pennsylvania counties failed to count write-in votes in 2006.[2] These include Armstrong, Clinton, Fulton, Jefferson, Lawrence, Monroe, Northumberland, Perry and Philadelphia counties. It is impossible to determine the exact number of votes the State failed to count, and therefore how many Pennsylvania citizens the State disenfranchised, but 7,662 voters residing in these counties were registered members of the Green Party, Libertarian Party, or Constitution Party in 2006.[3] Several registered voters residing in these counties have submitted sworn affidavits that they cast valid write-in votes during the 2006 general election, which the State did not count.[4]

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[2] *See* "Pennsylvania Write-in Votes by County, November 2006 General Election," on file with Center for Competitive Democracy (data provided by Pennsylvania Secretary of State's Bureau of Commissions, Elections and Legislation).

[3] *See* "Commonwealth of Pennsylvania 2006 Voter Registration Totals," available at http://www.dos.state.pa.us/elections/lib/elections/055_voter_registration_statistics/2006genelectionvoterregistotalscounty_unofficial.pdf.

[4] Affidavits from the following Pennsylvania citizens are on file with the Center for Competitive Democracy, stating that they cast valid write-in votes that the state of Pennsylvania did not count: James Babb, 706 Sunnyside Avenue Norristown, PA 19403; Thomas Martin 298 Shultz Hollow, Julian, PA 16844; Ebert Beeman, 12746 Route 19 South, Waterford, PA 16441; Sara Tate, 338 Upper St. George Road, Kennderdell, PA 16374; John A. Murphy, 18 Somerset Drive, East Fallowfield, PA 19320; Orville C. Robinson, 431 West Rittenhouse Street, Philadelphia, PA 19144; Michael J. Robertson, 614 Canoe Ripple Road, Sligo, PA 16225; Margaret K. Robertson, 614 Canoe Ripple Road, Sligo, PA

The State's practice of disenfranchising thousands of Pennsylvanians by failing to count their write-in votes alternatively compels this Court to grant the Petition for certiorari. This Court routinely considers whether states permit write-in votes when evaluating the burden imposed by election laws governing ballot access for minor party candidates. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 434 (1971) (upholding Georgia law in part because the law permitted write-in votes); *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (striking down Ohio law in part because the law banned write-in votes). *See also Burdick v. Takushi*, 504 U.S. 428, 436 (1992) (upholding ban on write-in votes because Hawaii provides candidates "easy access to the ballot"). The courts below never considered the State's failure to count write-in votes when evaluating the burdens Section 2911(b) imposes. Review by this Court is therefore necessary to consider those burdens in light of the thousands of Pennsylvania citizens the statute disenfranchises.

16255; Berlie R. Etzel, 113 Berlie Lane, Shippenville, PA 16254; Rochelle Etzel, 113 Berlie Lane, Shippenville, PA 16254; David Jahn, 403 Harrison Avenue, Glenolden, PA 19036; Peter Javsicas, 5031 Catharine Street, Philadelphia, PA 19143; Brandon Kane, 5031 Catharine Street, Philadelphia, PA 19143; Hillary Aisenstein, 7130 Cresheim Road, Philadelphia, A) 19119; Isabelle Buonocore, 116 Carpenter Street, Rear 1, Philadelphia, PA 19147; Bob Small, 305 Rutgers Avenue, Swarthmore, PA 19081; Rich Garella, 1136 Waverly Street Apt. 2, Philadelphia, PA 19147; Michele Grant, 517 S. 6th Street Apt. B, Philadelphia, PA 19147.

III. Section 2911(b) severely burdens minor political parties by terminating their legal status as political parties.

The Court of Appeals upheld the District Court's finding that Section 2911(b) imposes "minimal burdens on minor political parties." *Cortes*, 468 F.3d at 197. This too was clear error. In fact, the burden Section 2911(b) imposes on minor parties is so severe that the Green Party, the Libertarian Party and the Constitution Party, each of which qualified as a minor political party in Pennsylvania prior to the 2006 general election, no longer qualify.

As the Court of Appeals noted, Petitioners challenge "the combination of § 2831(a)'s 2% precondition to qualify as a political party and § 2911(b)'s 2% signature requirement that a minor political party must obtain in order for its candidates to be placed on the general election ballot." *Id.* at 190. The Court of Appeals upheld this "two-tiered" process, because it found the "minimal burdens" imposed to be "justified by Pennsylvania's interest in preventing ballot clutter and ensuring viable candidates." *Id.* at 196-97. However, this two-tiered process virtually guarantees the demise of minor parties in Pennsylvania, first by functionally barring their candidates from the ballot under Section 2911(b), and second by terminating their legal status as political parties if they fail to poll two percent in a general election under Section 2831(a). The proof of this vicious dilemma is that the State in fact disqualified the Green Party, the Libertarian Party and the Constitution Party as minor political parties after barring their candidates from the 2006 general election ballot.[5]

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[5] Voter registration statistics available from Pennsylvania's Secretary of State confirm that the State terminated these

Finally, in justifying the severe burdens the State imposes on minor parties in Pennsylvania, the courts below invoke a standard of "viability" that conflicts with this Court's long-standing practice of vindicating candidates' constitutional rights without regard for their perceived chances of winning an election. Eleven times, this Court has either placed minor party candidates on a ballot, or ruled after an election that they should have been on the ballot, and none of these candidates were expected to win. *See Norman v. Reed*, 502 U.S. 279 (1992) (affirming Harold Washington Party candidates' right to ballot access); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (affirming John B. Anderson's right to ballot access); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (affirming Socialist Workers Party and U.S. Labor Party candidates' right to ballot access); *Lendall v. Jernigan I*, not reported, (1976), *aff'd*, 433 U.S. 901 (1977) (affirming independent candidates' right to ballot access); *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. PA 1975), *aff'd*, 424 U.S. 959 (1976) (affirming U.S. Labor Party candidate's right to ballot access); *McCarthy v Briscoe*, 429 U.S. 1317 (1976) (affirming independent candidate Eugene McCarthy's right to ballot access); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (affirming Communist Party candidates' right to ballot access); *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D. NY 1970), *aff'd*, 400 U.S. 806 (affirming Socialist Workers Party and Socialist Labor Party candidates' right to ballot access); *Amos v. Hadnott*, 394 U.S. 358 (1969) (affirming National Democratic Party of Alabama candidates'

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parties' legal status as minor political parties after the 2006 general election. *See* "Voter Registration Statistics," Pennsylvania Department of State, available at http://www.dos.state.pa.us/elections/cwp/view.asp?a=1310&q=447072.

right to ballot access); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (affirming independent unpledged antiwar presidential electors' right to ballot access); *Williams v. Rhodes*, 393 U.S. 23 (1968) (affirming American Independent Party candidate's right to ballot access).

CONCLUSION

Far from imposing minimal burdens on minor party candidates, minor party voters and minor parties themselves, Section 2911(b) imposes burdens so severe as to be unprecedented in the history of American jurisprudence. The statute penalizes minor party candidates for engaging in quintessentially protected conduct, disenfranchises thousands of minor party voters, and terminated the legal status of three qualified minor parties in Pennsylvania in only one year. For these reasons, and those stated in the Petition for certiorari, the Petition should be granted.

July 30, 2007

Respectfully submitted,

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